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In the Supreme Court of the United States

OCTOBER TERM, 1991

WALTER L. NIXON, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS AND AMICUS CURIAE UNITED STATES SENATE

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QUESTIONS PRESENTED

1. Whether the Constitution's commitment to the Senate of "the sole Power to try all Impeachments" renders a complaint about the trial procedures employed by the Senate nonjusticiable.

2. Assuming that this case is justiciable, whether the constitutional assignment to the Senate to try all impeachments prevents that body from using a committee to compile an evidentiary record for consideration by the full Senate.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-57a, is reported at 938 F.2d 239. The opinion of Judge Edwards denying a petition for rehearing, Pet. App. 84a-85a, is unreported. The opinion of the district court, Pet. App. 58a-69a, is reported at 744 F. Supp. 9.

JURISDICTION

The judgment of the court of appeals was issued on July 9, 1991. A petition for rehearing was denied on August 5, 1991. Pet. App. 83a. The petition for a writ of certiorari was filed on November 4, 1991 (a Monday), and was granted on February 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND SENATE RULE INVOLVED

The Impeachment Trial Clause, U.S. Const. Art. I, § 3, Cl. 6, the Rulemaking Clause, U.S. Const. Art. I, § 5, Cl. 2, and Senate Impeachment Rule XI, S. Doc. No. 1, 101st Cong., 1st Sess. (1989), are reproduced in the appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

Petitioner Walter L. Nixon, Jr., a former United States District Judge for the Southern District of Mississippi, brought this action to challenge his conviction by the United States Senate on two articles of impeachment. Petitioner sued the United States, the Secretary of State, and the Director of the Administrative Office of the United States Courts, seeking an order declaring that the Senate impeachment trial procedures are invalid and that he remains entitled to full pay and benefits as a district judge. See J.A. 4a-11a (Complaint). The United States District Court for the District of Columbia dismissed petitioner's challenge as nonjusticiable. Pet. App. 58a-69a. The court of appeals affirmed. *Id.* at 1a-57a.[1]

A. The Senate's Impeachment Trial Procedures

The Constitution provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and

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[1] The United States Senate participated fully in the proceedings below as *amicus curiae* and appears here also in that capacity pursuant to 2 U.S.C. 288e(a), which provides that the Senate may direct its Legal Counsel to appear as *amicus curiae* in its name "in any court of the United States * * * in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue." Permission to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. 288*l*(a). See S. Res. 237, 101st Cong., 2d Sess. (1990); 136 Cong. Rec. S587-S588 (daily ed. Jan. 30, 1990) (directing appearance in this case).

Misdemeanors." U.S. Const. Art. II, § 4. It further provides that the House of Representatives "shall have the sole Power of Impeachment," U.S. Const. Art. I, § 2, Cl. 5, and that the Senate "shall have the sole Power to try all Impeachments." U.S. Const. Art. I, § 3, Cl. 6. A Senate conviction on articles of impeachment "shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." U.S. Const. Art. I, § 3, Cl. 7.

The Constitution does not specify the procedures that the Senate shall follow in trying impeachments, except to impose the following restrictions:

> When sitting for that Purpose, [the Senate] shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two thirds of the Members present.

U.S. Const. Art. I, § 3, Cl. 6. The Constitution does provide, however, that the Senate "may determine the Rules of its Proceedings." U.S. Const. Art. I, § 5, Cl. 2. The Senate has promulgated "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials." See *Senate Manual*, S. Doc. No. 1, 101st Cong., 1st Sess. 183-192 (1989) (Senate Impeachment Rules).[2]

The Senate Impeachment Rules specify, among other things, how evidence may be received. Rule XI states that "the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine." S. Doc. No. 1, *supra*, at 186. Rule XI further provides:

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[2] The present form of the Senate Impeachment Rules can be traced back to 1868, when those Rules were comprehensively revised, based on practices utilized in earlier proceedings, in preparation for the trial of President Andrew Johnson. The rules have been amended from time to time since.

> The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

Id. at 186-187. In this case, the Senate employed those procedures, which it first adopted in 1935 (79 Cong. Rec. 8309-8310) and amended in 1986 (132 Cong. Rec. 21,892-21,894).[3]

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[3] Under Rule XI, appointment of an evidentiary committee is not automatic, but requires an individual judgment by the Senate in each impeachment proceeding. See S. Rep. No. 401, 99th Cong., 2d Sess. 5 (1986). The Senate first determined to appoint a committee to receive evidence in 1986 in the impeachment trial of then-Judge Harry Claiborne. Three years later, during then-Judge Alcee Hastings' impeachment, the Senate studied the Claiborne experience and revisited the constitutional issues relevant to use of an evidentiary committee. See S. Rep. No. 1, 101st Cong., 1st Sess. 5-74 (1989). After concluding in the Hastings matter that use of a committee was constitutional and prudent, see 135 Cong. Rec. 4533-4534 (1989), the Senate was prepared to proceed directly to appointment of an evidentiary committee when, two months later, the House presented impeachment articles against petitioner.

Although the Senate determined to use a committee to receive evidence in all three cases, it did not delegate all responsibility over the matters to the appointed committees. To the contrary, the Senate structured the proceedings so that the full Senate would make the particular decisions appropriate to each case. In the Claiborne proceeding, the full Senate heard argument on and decided several motions, including motions to postpone the proceedings, to declare a standard of proof, and to issue subpoenas for additional witnesses. See 132 Cong. Rec. 29,127-29,136, 29,152-29,153, 29,413 (1986). In the Hastings impeachment, the Senate considered Hastings' motion to dismiss all but one of the impeachment articles on

B. Petitioner's Criminal Conviction

Prior to petitioner's impeachment and removal from office, he was found guilty, after a jury trial in the United States District Court for the Southern District of Mississippi, on two counts of making false statements before a federal grand jury, in violation of 18 U.S.C. 1623. The evidence supporting petitioner's criminal conviction is described in the court of appeals decision affirming the conviction, *United States* v. *Nixon*, 816 F.2d 1022 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988), the district court decision denying petitioner's motion for a new trial, *Nixon* v. *United States*, 703 F. Supp. 538 (S.D. Miss. 1988), and the court of appeals decision affirming that ruling. *United States* v. *Nixon*, 881 F.2d 1305 (5th Cir. 1989). See Pet. App. 2a.

Briefly stated, petitioner lied to a federal grand jury convened to investigate allegations that he had accepted an unlawful gratuity from a Mississippi businessman, Wiley Fairchild. While sitting as a federal judge, petitioner participated with Fairchild in an oil and gas venture in which petitioner "was able to purchase an interest in three oil well properties at an extremely modest price." 816 F.2d at 1024. During the period of the business venture, Wiley's son, Drew, was arrested on drug smuggling charges and indicted by a state grand jury. Petitioner thereafter discussed the state indictment, first with Wiley Fairchild at Fairchild's office, then with the state prosecutor, Bud Holmes, at Holmes' farm, and finally in a telephone conversation, placed from Holmes' farm, to Wiley Fairchild. See *Id.* at 1026-1029. Although petitioner has disputed the precise content of those con-

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legal grounds, before appointing an evidentiary committee. See 135 Cong. Rec. 4221-4235, 4532-4533 (1989). As to petitioner, the full Senate adjudicated two motions he filed, including a motion to dismiss one of the articles. See 135 Cong. Rec. S14,634-S14,635 (daily ed. Nov. 3, 1989). Thus, the Senate assigns to a committee only the limited duty of compiling an evidentiary record to serve as the basis for the Senate's deliberations.

versations, he does not dispute that he had three conversations relating to Drew's indictment. *Ibid.*[4]

When federal investigators inquired about petitioner's involvement in the Drew Fairchild matter, petitioner did not reveal his three conversations. When petitioner was asked under oath before the federal grand jury whether Bud Holmes had ever discussed the Drew Fairchild case with petitioner, petitioner replied:

> No, not to the best of my recollection. I think I would recall if he had.

816 F.2d at 1025. He later volunteered under oath:

> I have never talked to anyone about the case, any federal judge or state judge, federal prosecutor or state prosecutor, and I never handled any aspect of this case in federal court. * * * I never handled any part of it, never had a thing to do with it at all, and never talked to anyone, state or federal, prosecutor or judge, [that] in any way influence[d] anybody with respect to this case.

Ibid. (corrections to transcript in brackets). On the basis of those denials, petitioner was convicted on two counts of making false statements to the grand jury and sentenced to prison. He was acquitted on a third false statement count and on one count of receipt of an unlawful gratuity. Pet. App. 2a. See also 87-650 Br. in Opp. in *Nixon* v. *United States*, cert. denied, 484 U.S. 1026 (1988).

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[4] According to petitioner, in the first conversation, Wiley Fairchild contended that Holmes had brought the indictment to blackmail Fairchild, and Fairchild "wanted me to mention something about that to Bud Holmes." 816 F.2d at 1026, 1027. Petitioner admits that he then visited Bud Holmes and raised Fairchild's concerns. *Id.* at 1027. Petitioner also admits that after speaking with Holmes, he spoke to Fairchild by phone about the conversation with Holmes. *Id.* at 1028. Fairchild, Holmes, and a third witness, Carroll Ingram, testified that petitioner played a more significant role than petitioner has acknowledged in advocating Fairchild's interests. *Id.* at 1026-1029.

C. Petitioner's Impeachment Trial

Petitioner was impeached and removed from office for the same conduct—perjurious testimony to a federal grand jury—that supported his criminal conviction. Following petitioner's criminal conviction, the Judicial Conference certified to the House of Representatives that impeachment might be warranted. The House investigated the matter, and one of its subcommittees heard seven days of testimony from nine witnesses, including petitioner. See H.R. Rep. No. 36, 101st Cong., 1st Sess. 14-15 (1989). On May 10, 1989, the House impeached petitioner on three articles for high crimes and misdemeanors. See 135 Cong. Rec. H1811 (daily ed. May 10, 1989). Articles I and II charged petitioner with giving false testimony before the grand jury, conduct for which he had been criminally convicted. Article III charged petitioner with bringing disrepute on the federal Judiciary by making numerous false statements to the grand jury and federal investigators. See App., *infra*, 3a-7a.

When the Members of the Senate received the articles of impeachment, they took the constitutionally prescribed oath, Art. I, § 3, Cl. 6—swearing to "do impartial justice according to the Constitution and laws," S. Doc. No. 1, *supra*, at 190—and agreed to Senate Resolution 128, providing for appointment of a twelve-member Impeachment Trial Committee in accordance with Senate Impeachment Rule XI. S. Res. 128, 101st Cong., 1st Sess. (1989) (App., *infra*, 8a-9a). The Resolution directed the Committee, in accordance with Rule XI, to compile and report to the full Senate an evidentiary record concerning the House charges. The Resolution also authorized the Committee "to report to the Senate a statement of facts that are not contested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact." 135 Cong. Rec. S5199 (daily ed. May 11, 1989). See App., *infra*, 8a-9a.[5]

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[5] In June 1989, before the Committee began taking evidence, petitioner intervened in a pending civil action filed by then-Judge Alcee

The Senate Committee heard testimony over four days from ten witnesses, including petitioner.[6] Petitioner's counsel thoroughly cross-examined the witnesses called by the House impeachment managers, but chose to call no witnesses other than petitioner and certain character witnesses. In October 1989, the Committee reported to the Senate a record of its proceedings, *Hearings Before the Senate Impeachment Trial Comm.: Report of the Senate Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr. (S. Hrg. 247)*, 101st Cong., 1st Sess. Pts. 1-4 (1989), and the requested statement of uncontested facts and summary of evidence on contested factual issues, *Report of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.*, S. Rep. No. 164, 101st Cong., 1st Sess. (1989). In accordance with the Senate's instructions, the Committee report made no proposed findings on contested issues of fact and made no recommendations regarding disposition of

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Hastings in the United States District Court for the District of Columbia, to attack his own impeachment proceedings. Petitioner contended that the appointment of the Committee under Rule XI violated the constitutional provision that the Senate try all impeachments. The district court denied petitioner's motion for a preliminary injunction and dismissed both judges' complaints. *Hastings* v. *United States Senate*, 716 F. Supp. 38 (D.D.C. 1989) (*reprinted at* Pet. App. 70a-78a). The district court held that petitioner's claim was nonjusticiable, stating that "[i]t is crystal clear that impeachment proceedings are wholly committed to Congress under the Constitution" and that the relief petitioner sought was "utterly foreign to our system of divided powers." 716 F. Supp. at 40, 41. The court of appeals affirmed the dismissal of the complaints on lack of ripeness grounds, without reaching the justiciability issue. See 887 F.2d 332 (D.C. Cir. 1989) (Table); No. 89-5191 (D.C. Cir. Oct. 18, 1989), slip op. 2 (*reprinted at* Pet. App. 79a-82a).

[6] Both parties had the opportunity to summon witnesses for examination, to cross-examine adverse witnesses, and to introduce documentary evidence. Members of the Committee also questioned witnesses. The Committee's proceedings were broadcast live to all Senate offices and were videotaped to enable Senators to observe the proceedings at their convenience. Pet. App. 21a.

the impeachment articles. See generally S. Rep. No. 164, *supra*; Pet. App. 20a.[7]

Both petitioner and the House impeachment managers filed extensive briefs on issues of fact and law, which were distributed to all Senators. On November 1, 1989, the full Senate set aside three hours for both sides to present arguments. Petitioner divided his time with his attorney and personally addressed the full Senate for approximately 30 minutes. 135 Cong. Rec. S14,502-S14,504 (daily ed.). His counsel was given as much additional time as he desired to present his points, *id.* at S14,511, and petitioner declined a similar offer to extend his own presentation. *Id.* at S14,504. In his written brief, petitioner noted his contention that the receipt of evidence by a committee under Rule XI is unconstitutional. But at no point during the afternoon of argument did petitioner or his counsel attempt to persuade the Senate to exercise its discretion to send for any particular witnesses to testify before the full Senate. At the end of the arguments, a number of Senators posed questions to the parties or their counsel, and petitioner personally answered several of them. *Id.* at S14,513-S14,516. See Pet. App. 22a.

The Senate deliberated for six hours in closed session on the impeachment articles. See 135 Cong. Rec. S14,561 (daily ed. Nov. 2, 1989). On November 3, 1989, the Senate voted by the necessary two-thirds majority to convict petitioner on two of the three articles of impeachment. The Senate first denied, by a vote of 90 to 7, petitioner's motion for what he described as "a full trial before the full Senate." *Id.* at S14,634 (daily ed.). It then convicted petitioner on impeachment Article I by a vote of 89 to 8 and on Article II by a vote of 78 to 19. On Article III, petitioner was acquitted because only 57 Sen-

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[7] The Committee's hearing record, which was composed of nine volumes, included the Committee's proceedings as well as the records of petitioner's criminal proceedings and House impeachment proceedings.

ators voted to convict—less than the two-thirds majority required for conviction. *Id.* at S14,635-S14,636. See Pet. App. 22a.

D. Judicial Proceedings Below

Petitioner subsequently filed this action, alleging that the Senate's use of the Rule XI procedures violates the constitutional provision that the Senate "try" all impeachments. The district court granted respondents' motion to dismiss the complaint as nonjusticiable, concluding that petitioner "has not established the kind of clear violation of a specific constitutional requirement which would trigger judicial authority to review a solemn and serious Senate action." Pet. App. 66a. The court observed that the "opportunity to present and cross-examine witnesses before the Committee and the opportunity to argue both personally and by counsel before the full Senate" undermined petitioner's claim of a justiciable "departure from the Constitution's textual commitment to the Senate of the 'sole Power to try all Impeachments.'" *Id.* at 68a.

The court of appeals affirmed. In the opinion for the court, Judge Williams concluded that the text of the Constitution, which gives the Senate "the sole Power to try all Impeachments," Art. I, § 3, Cl. 6, commits the impeachment trial process exclusively to that body and renders legal actions challenging the Senate's procedures nonjusticiable. Pet. App. 4a, 8a, 10a. He found that the history of the Constitution's impeachment provisions further demonstrated that "the framers simply assumed that courts had nothing whatever to do with impeachments." *Id.* at 8a.[8] Judge Williams concluded that the textual commitment of impeachment trials to the Senate, but-

[8] Judge Williams explained that the Framers relied on structural safeguards other than judicial review—including the division of impeachment powers between the two Houses, the two-thirds majority requirement in the Senate, and the political accountability of members of Congress—to protect the impeachment process from abuse. Pet. App. 8a-9a.

tressed by that history, justified invocation of the political question doctrine of nonjusticiability. *Id.* at 10a-15a.[9]

Judge Randolph filed a concurring opinion. Pet. App. 16a-18a. Like Judge Williams, he concluded that "the controlling question" is whether "the judiciary can pass upon the validity of the Senate's procedural decisions." *Id.* at 16a, 18a. Judge Randolph reasoned that "[t]he 'sole Power to try all Impeachments' must include the sole power to set the procedures for trial, as the Senate did here." *Id.* at 16a. If it were otherwise, "judicial review would lead to judicial control." *Id.* at 17a. Judge Randolph found it unnecessary, however, to invoke the political question doctrine to find petitioner's challenge nonjusticiable, stating: "My conclusion that the courts have no such role to play in the impeachment process ultimately rests on my interpretation of the Constitution." *Id.* at 18a.

Judge Edwards disagreed with the majority's conclusion that petitioner's claim is nonjusticiable, but concurred in the judgment. Pet. App. 18a-57a. He concluded that the courts "are not only competent, but duty-bound" to determine what procedures the Framers contemplated in stating that the Senate shall "try" an impeachment. *Id.* at 19a. Reaching the merits, he concluded that the Framers of the Constitution intended the Senate to have more procedural flexibility in conducting impeachment proceedings than a court has in a criminal trial and that historical practice confirms that view. *Id.* at 43a-54a. Judge Edwards noted that the validity of the Senate practice attacked here "seems especially clear" in light of the fact that petitioner conceded that he could be tried in the

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[9] Judge Williams observed that while "textual commitment" provides the "primary reason for invoking the political question doctrine," "the need for finality also demands it." Pet. App. 13a. He explained that the Framers' commitment of final impeachment authority to the Senate, without judicial review, avoided the "chaos" that would result if impeachment proceedings against important government officers were subject to protracted judicial challenges that could undermine the authority of the officers' replacements and "confound matters indefinitely." *Id.* at 14a.

presence of only a small number of Senators, as long as it was done on the Senate floor. *Id.* at 56a.[10]

SUMMARY OF ARGUMENT

I. Petitioner's challenge to the Senate's impeachment trial procedures fails at the outset, because his objections are not justiciable. The Constitution grants the Senate "sole Power" over the trial of impeachments. That conferral commits to the Senate alone the authority to determine how trial evidence shall be collected for the Senate's use. Whether one analyzes the matter under the "political question" doctrine or through direct application of the Impeachment Trial Clause, it is clear that the courts have no role to play in reviewing the Senate's procedures for receiving evidence and taking testimony.

The Impeachment Trial Clause—and specifically its grant of "sole Power to try all Impeachments," U.S. Const. Art. I, § 3, Cl. 6—conveys the Framers' fundamental judgment that the Senate alone shall determine matters of impeachment trial procedure not otherwise spelled out in the constitutional text. The quoted words are a grant of authority, not a limitation on its exercise. Indeed, the Impeachment Trial Clause would confer far less than "sole Power" if it did not give the Senate exclusive authority to determine the structure of the proceedings and to resolve procedural issues, such as how to receive evidence. Significantly, although the Impeachment Trial Clause specifies certain procedures that the Senate must follow, it is silent on the question of how evidence shall be taken. That matter is accordingly left to the Senate's unreviewable discretion.

The Constitution's drafting history and the contemporaneous commentary confirm that the Senate's procedures for receiving evidence are not subject to judicial review.

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[10] In a rehearing petition, petitioner's counsel challenged the precise nature of his concession on this point. After consulting the transcript of oral argument in the court of appeals, Judge Edwards denied the petition. Pet. App. 84a-85a.

Those sources demonstrate that the Framers envisioned the impeachment process as an important check on the President and the *sole* check on an independent judiciary. The Framers therefore placed that process—their only mechanism for removing life tenured federal judges—entirely within a different, politically accountable body. The Framers' design clearly would be subverted if "the judiciary would have final unreviewable power over the one procedure established to restrain excesses in all of its other final and unreviewable powers." Pet. App. 15a.

II. Even if petitioner's challenge were justiciable, it would fail. The issue here is not—as petitioner would have it—whether "trial by committee is unconstitutional." The question instead is whether the Impeachment Trial Clause prohibits the Senate from appointing a committee of its members, pursuant to Senate Impeachment Rule XI, to receive evidence and take testimony for use by the whole body. Plainly, it does not. The Impeachment Trial Clause's grant to the Senate of the power "to try" all impeachments does not dictate that evidence must be received on the Senate floor.

Petitioner argues that the Senate can "try" an impeachment only if the full Senate gathers to see and hear testimony. The Framers' use of the word "try"—particularly when viewed from their lexicon—falls far short of compelling that result. The Senate can "examine" impeachments "as a judge" and act as a "judicial tribunal" by appointing a committee to assemble the evidence relevant to the Senate's collective judgment. The House and Senate have long used such committees when they are called upon to act as "a judicial tribunal" in judging elections, returns, and the qualifications of their members. This Court itself uses an analogous technique—the employment of special masters—when adjudicating original actions. In short, the word "try" simply lacks the limiting character that petitioner ascribes to it.

The Constitution's drafting history and contemporaneous commentary further confirm that the Senate may

appoint a committee to receive evidence for the Senate's use. The Framers did not indicate any intention to restrict how the Senate would receive evidence. To the contrary, Hamilton's *Federalist* essays noted that the Senate's impeachment trial procedures would necessarily be more flexible than those of the courts. Additionally, Hamilton observed that the institution of impeachment was borrowed from England. The House of Lords used committees to hear evidence in impeachment trials, and it is likely that the Framers were aware of that practice. Finally, there is no merit to petitioner's suggestion that the Senate's use of a committee in this case was unfair. Petitioner's removal from office is not attributable to any defect in the Senate's procedures. Rather it is the consequence of his breach of the public trust.

ARGUMENT

I. PETITIONER'S CHALLENGE TO THE SENATE'S IMPEACHMENT PROCEDURES IS NOT JUSTICIABLE

Petitioner challenges the Senate's procedures for receiving evidence in impeachment trials. Specifically, petitioner argues that the Impeachment Trial Clause prohibits the Senate from appointing a Senate committee, pursuant to Senate Impeachment Rule XI, "to receive evidence and take testimony" for use in the impeachment trial. The court of appeals correctly concluded that the courts lack authority to review petitioner's collateral attack on the Senate's evidence-gathering procedures. Judge Williams applied the "political question" doctrine, while Judge Randolph concluded that, " 'political question' or not," the Impeachment Trial Clause confers upon the Senate exclusive authority to determine how evidence shall be received. Whether examined as a "political question" or through direct application of the Constitution's text to the specific issue at hand, it is clear that the Senate's impeachment trial procedures present no justiciable controversy.

A. The Political Question Doctrine Renders Petitioner's Challenge Nonjusticiable

This Court has described as "political" questions certain disputes that, for various reasons, are nonjusticiable. See, *e.g.*, *United States Dep't of Commerce* v. *Montana*, 112 S. Ct. 1415, 1424-1426 (1992); *Baker* v. *Carr*, 369 U.S. 186, 208-237 (1962); *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 39, 42 (1849); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). As the Court has explained, the "political question" doctrine has attributes that "in various settings, diverge, combine, appear, and disappear in seeming disorderliness." *Baker*, 369 U.S. at 210. Although the doctrine is "amorphous and partly prudential," *Morgan* v. *United States*, 801 F.2d 445, 447 (D.C. Cir. 1986) (Scalia, J.), cert. denied, 480 U.S. 911 (1987), it is rooted in basic principles of separation of powers:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

As Judge Williams explains, Pet. App. 4a-10a, the "textual commitment" element of the political question doctrine establishes the nonreviewability of the Senate's conduct of impeachment trials: "If the Constitution makes a 'textually demonstrable commitment' of *any* issue to a 'coordinate political department,' it so commits the conduct of impeachment trials to the Senate." *Id.* at

10a. But another element is present as well. As Judge Williams determined, *id.* at 13a-14a, the conclusion that controversies about impeachment trial procedures are committed to the Senate is buttressed by the "unusual need for unquestioning adherence to a political decision already made." *Baker*, 369 U.S. at 217. The need for finality in the Senate's impeachment judgments is "extreme." Pet. App. 14a. In the context of an impeachment of a President or a Justice of this Court, "the intrusion of the courts would expose the political life of the country to months, or perhaps years, of chaos." *Ibid.*

Although Judge Williams' reading of this Court's decisions caused him to "honor the [political question] doctrine and apply it here," Pet. App. 14a, the same result obtains without invoking the doctrine. As Judge Randolph correctly recognized, a direct application of the Impeachment Trial Clause likewise suffices to render that challenge nonjusticiable.

B. The Impeachment Trial Clause Grants to the Senate the Exclusive Power to Determine How Evidence Shall Be Received in Impeachment Trials

As his "Questions Presented" make clear, petitioner challenges his impeachment conviction on a narrow ground—that the Impeachment Trial Clause forbids the Senate from employing the procedures set forth in Senate Impeachment Rule XI to receive evidence of his misconduct. Petitioner, however, misapprehends the meaning and significance of that constitutional provision. The Impeachment Trial Clause grants exclusive authority to the Senate to determine how such evidence shall be received.

1. *The Impeachment Trial Clause, by its terms, confers exclusive authority to determine impeachment trial procedure*

The Framers crafted the Impeachment Clause and the Impeachment Trial Clause to allocate governmental responsibilities, but left the details of impeachment pro-

cedures to those who would exercise those responsibilities. Their intention is evident from the language they used. The Impeachment Clause states that the House of Representatives "shall have the sole Power of Impeachment." U.S. Const. Art. I, § 2, Cl. 5. Similarly, the Impeachment Trial Clause states that the Senate "shall have the sole Power to try all impeachments," subject only to three structural limitations on the impeachment trial process. U.S. Const. Art. I, § 3, Cl. 6. See p. 3, *supra*. The quoted words confer authority; they are not limitations on its exercise.

The Constitution's grant of "sole Power" in this context is both striking and significant. "Nowhere else does the Constitution explicitly confer on a body the 'sole' power to do anything." Pet. App. 4a. The text conveys a fundamental judgment that, in our political system, the House of Representatives and the Senate—rather than a court—are the appropriate bodies, respectively, to impeach and to try impeachments. The Framers concluded that only politically accountable representatives—rather than a life tenured judiciary—should exercise authority to remove from office those federal officers who have violated the public trust.[11]

The Constitution's grant to the Senate of the "sole Power to try all Impeachments" vests in the Senate alone the authority to determine matters of impeachment trial procedure not otherwise specified in the constitutional text. The Impeachment Trial Clause would confer far less than the "sole Power to try all Impeachments" if it did not give the Senate sole power to determine the structure of the proceedings and to resolve procedural

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[11] As Alexander Hamilton explained in urging ratification of the Constitution, the Framers selected the Senate as the appropriate tribunal because impeachable offenses are "of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself." *The Federalist* No. 65, at 439 (J. Cooke ed. 1961). Accord 1 J. Story, *Commentaries on the Constitution of the United States* 547 (5th ed. 1905) ("the power partakes of a political character, as it respects injuries to the society in its political character").

issues, such as how to receive evidence and take testimony. As petitioner himself strenuously argues, a grant of power to "try" conveys more than the power "merely to 'judge' or 'vote on.'" Pet. Br. 26. It also includes the power to formulate rules of procedure ensuring the fairness and efficiency of the impeachment trial.

That conclusion is dictated not only by what the Impeachment Trial Clause says, but by what it does *not* say. The Clause designates no procedures for the Senate's trial of impeachments save three: (a) the Senators must be under oath; (b) the Chief Justice shall preside when the President is tried; and (c) two-thirds of the Senators present must concur for conviction. The Impeachment Trial Clause says nothing about other procedures, such as rules for presenting and prosecuting articles of impeachment, questioning of witnesses, and receiving of evidence. That silence is telling. The Framers gave fastidious attention to structural limitations on conferred powers, but they plainly concluded that a Senate subject to the three stated limitations—and electoral accountability—could be trusted to complete the impeachment trial process through appropriate rules of procedure.[12]

The Constitution's grant of power to the Senate to determine impeachment trial procedure is hardly surprising. The document, after all, is a basic charter of government, not a compendium of procedure. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("we must never forget that it is a *constitution* that we are expounding").[13] The Framers explicitly confirmed that

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[12] Cf. *Dillon* v. *Gloss*, 256 U.S. 368, 373 (1921) (Article V "is intended to invest Congress with a wide range of power in proposing amendments" and "subjects this power to only two restrictions."); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (The Commerce Clause power, "like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.").

[13] See, *e.g.*, *Dillon* v. *Gloss*, 256 U.S. at 376 ("As a rule the Constitution speaks in general terms, leaving Congress to deal with

understanding through the Rulemaking Clause, which provides that "[e]ach House may determine the Rules of its Proceedings," U.S. Const. Art. I, § 5, Cl. 2. This Court concluded more than a century ago that, in the usual situation, such rules are subject to only limited judicial review:

> Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts, the question is only one of power.

United States v. *Ballin*, 144 U.S. 1, 5 (1892). When, as here, the Constitution grants the House and Senate the "sole Power" to conduct a particular function—namely, the impeachment process—the procedures they select are beyond the scrutiny of the Judicial Branch.

2. *The drafting history and contemporaneous commentary confirm that the Senate's impeachment trial procedures are not subject to judicial review*

The proceedings of the Constitutional Convention confirm that challenges to the Senate's impeachment trial procedures are not justiciable. As the court of appeals pointedly observed, "the parties have not identified a single statement in either the framers' or ratifiers' debates alluding even to the possibility of judicial review, and [Raoul] Berger, its ardent proponent, acknowledges the absence of any such mention at the state conventions." Pet. App. 9a. The obvious implication is that no such review was contemplated. That inference is all the more powerful in light of the Framers' sense of the limited role of the Judicial Branch.[14]

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subsidiary matters of detail as the public interests and changing conditions may require.").

[14] As the court of appeals noted, Hamilton identified judicial review as a check on unconstitutional bills of attainder, ex post facto laws, and statutes, but he made no reference to judicial review of

The inference is further strengthened by the practical concerns that did occupy the Framers' deliberations. As petitioner himself acknowledges, the Framers "struggled for months over *what entity* should have such ultimate power and *how to control its exercise.*" Pet. Br. 3 (emphasis added).[15] After careful reflection, the Framers placed the impeachment and removal power *outside* the Judicial Branch. Such "a deliberate change made by the Framers" carries great significance. *Buckley* v. *Valeo*, 424 U.S. 1, 129 (1976) (shift of the appointment power from the Senate to the President). Additionally, the Framers determined to control the exercise of the impeachment power primarily through division of that power between the two Houses; the two-thirds majority requirement in the Senate; and the political accountability of members of Congress—*not* through judicial review of impeachment procedures. See Pet. App. 8a-9a.

Judicial review would be fundamentally inconsistent with the Framers' expressed objectives. For example, the

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impeachment proceedings. See *The Federalist* No. 78 (J. Cooke ed. 1961).

[15] See 1 *The Records of the Federal Convention of 1787*, at 21-22 (M. Farrand ed. 1966) [hereinafter Farrand] (Virginia Plan proposed that a "National Judiciary" have jurisdiction "to hear and determine * * * impeachments of any National officers") (ninth resolved clause); 1 Farrand 23 & n.14, 3 Farrand 608 (South Carolina proposal that Senate and federal Court form a court to try impeachments); 3 Farrand 600 (alternative statement of South Carolina proposal that Supreme Court try impeachments); 1 Farrand 85 (Delaware proposed that the Executive be removable by Congress on the request of the state legislatures); 1 Farrand 244 (New Jersey Plan proposed that "federal Judiciary * * * have authority to hear & determine in the first instance on all impeachments of federal officers"); 2 Farrand 178-179, 186 (Committee of Detail proposal that the Supreme Court try impeachments); 2 Farrand 367 (Committee of Detail proposed addition specifying that, in impeachments of Supreme Court Justices, Senate shall try impeachments); 2 Farrand 592 (final version providing that the Senate shall have the sole power to try all impeachments).

debates at the Constitutional Convention reveal that the Senate—rather than the Supreme Court—was advocated as the appropriate impeachment tribunal for the President, because the Court "were too few in number and might be warped or corrupted." 2 Farrand 551 (G. Morris). Additionally, the Court was perceived as an improper forum to try the President "because the Judges would be appointed by him." *Ibid.* (R. Sherman).[16] Those concerns similarly militate against judicial review of a Senate impeachment trial, whereby the will of a single appointed judge could reverse the Senate's collective decision.[17]

In view of the Framers' assiduous attention to checks and balances among coordinate branches of government, it is highly improbable that the Framers envisioned any role for judicial review of Senate impeachment procedures in the removal of federal judges. As Alexander Hamilton explained in *The Federalist* No. 79, the impeachment power is the sole basis for constraining the

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[16] As Hamilton explained, the Convention "thought the Senate the most fit depositary of this important trust." *The Federalist* No. 65, at 440 (J. Cooke ed. 1961). "What other body would be likely to feel *confidence enough in its own situation*, to preserve unawed and uninfluenced the necessary impartiality between an *individual* accused, and the *representatives of the people, his accusers?*" *Id.* at 441 (emphasis in original).

[17] The Framers did ultimately specify that the Chief Justice would preside over the trial of a sitting President. They included that requirement to resolve the palpable conflict of interest that would arise if the Vice President—the normal presiding officer, U.S. Const. Art. I, § 3, Cl. 4,—were to preside. See 1 J. Story, *supra*, at 557. That resolution would have not have commended itself—particularly in light of the Framers' acute concern for conflicts of interest—if the Framers had envisioned that the trial would be subject to judicial review. Article III contains no grant of original jurisdiction to this Court over challenges to impeachment decisions, and it would be peculiar indeed for the Chief Justice's procedural rulings to be subject to review in the lower courts.

excesses of appointed and life-tenured judges.[18] He later emphasized:

> This is alone a complete security. There can never be a danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords at the same time a cogent argument for constituting the senate a court for the trial of impeachments.

The Federalist No. 81, at 546 (J. Cooke ed. 1961). As the court of appeals observed, "Hamilton's emphatic language would have fallen rather flat if candor had compelled him to add that, of course, the judges themselves would sit in final judgment over this check on their excesses." Pet. App. 6a. Cf. *Goldwater* v. *Carter*, 444 U.S. 996, 1001 n.2 (1979) (Powell, J., concurring).[19]

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[18] "The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified from holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges." *The Federalist* No. 79, at 532-533 (J. Cooke ed. 1961).

[19] As the court of appeals additionally observed, the fact that the Framers envisioned "distinct, independent forums" for the impeachment trial and for a criminal trial, provides yet another indication that they did not intend that the Senate trial would be subject to judicial review. Pet. App. 6a-7a. See *The Federalist* No. 65, at 442 (J. Cooke ed. 1961).

3. *Neither this Court's interpretive function nor the separation of powers doctrine mandates judicial review of the Senate's impeachment trial procedures*

Petitioner advances two arguments in support of judicial review of the Senate's impeachment trial procedures: (a) the Impeachment Trial Clause allows it (Pet. Br. 40-46); and (b) separation of powers requires it (*id.* at 46-50). Both arguments are flawed. Properly interpreted, the Impeachment Trial Clause commits the question of appropriate procedures to the Senate, and the separation of powers principle requires the Court to respect that grant of authority.

a. Petitioner contends that this Court should review his challenge because "'[i]t is emphatically the province and duty of the judicial department to say what the law is.'" Pet. Br. 40 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177). He argues that, under that principle, courts are entitled to give content to the Impeachment Trial Clause's use of the term "try." In essence, petitioner urges this Court to use the Impeachment Trial Clause—and specifically its use of the word "try"—to create a federal common law of impeachment trial procedure.

Petitioner's vision of this Court's role under the Constitution is only partially correct. The Court is surely responsible for interpreting the Constitution, but it fulfills that interpretive duty by declaring what the Impeachment Trial Clause clearly states: "The Senate shall *have the sole Power to* try all Impeachments" (emphasis added). The text does *not* say, as petitioner would have it, that the Senate "shall try all Impeachments." The Framers' grant of "sole Power"—rather than a simple direction to "try"—has controlling importance. As we have explained, that specification unambiguously grants to the Senate alone authority to determine impeachment trial procedures, including how evidence shall be received in impeachment trials. Courts are not entitled to exercise

that power indirectly through judicial construction of the word "try." [20]

Petitioner recognizes that the role he envisions for the courts in determining impeachment trial procedure has long been rejected as incompatible with the constitutional requirement that the Senate shall have the "sole Power" to try impeachments. See *Ritter* v. *United States*, 84 Cl. Ct. 293, 296 (1936), cert. denied, 300 U.S. 668 (1937).[21] Petitioner nevertheless suggests resolving the inconsistency by discounting the significance of the Framers' words. According to petitioner, "the word 'sole' cannot carry the immense significance so conferred on it," because "the term was a cosmetic edit inserted by the Committee of Style at the tail end of the Convention." Pet. Br. 42. That argument is without merit.

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[20] The consequences of a court's specifying the Senate's impeachment trial procedures are daunting:

> If the Senate did not have the sole power to determine how to conduct the proceedings, if the judiciary had the final say on what procedures the Senate must put in place, it is only a short step to judicial review of the Senate's compliance with those procedures. Once that dike bursts, there can be no holding back the flood of issues that inevitably will be presented to the courts.

Pet. App. 16a (Randolph, J., concurring). Indeed, former Judge Hastings has filed an action, currently pending in the district court, challenging not only the use of an evidentiary committee in his impeachment trial, but also the fairness of numerous procedural rulings, including scheduling decisions. *Hastings* v. *United States*, Civ. No. 91-1713 (D.D.C. filed July 15, 1991).

[21] Only 30 years ago, the prospect of judicial review of a Senate impeachment decision appeared incredible. As Professor Herbert Wechsler rhetorically asked, "Who, for example, would contend that the civil courts may properly review a judgment of impeachment when article I, section 3 declares that the 'sole Power to try' is in the Senate?" Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 8 (1959). See also, *e.g.*, C. Black, *Impeachment: A Handbook* 63 (1974); C. Wright, *The Law of Federal Courts* § 2.15, at 109 (3d ed. 1986); Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 Ky. L. J. 643, 674 (1987-1988); Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L. J. 707, 728-732 (1987-1988).

The Constitution's ratified text is the authoritative guide to the structure of our government. Although that text was successively drafted and redrafted—first by the Committee of the Whole (consisting of all 55 members), then by the Committee of Detail (consisting of five members), and finally by the Committee of Style (also consisting of five members)—only the final draft can truly be said to capture the complete intent of the Framers and the full understanding of the ratifying States. That final draft submitted by the Committee of Style is, after all, what the Framers approved and the People, through their State Conventions, ratified.

Petitioner nevertheless contends that the Committee of Style's changes should be "stripped of substantive significance" because the Committee was appointed only "'to revise the stile of and arrange the articles which had been agreed to.'" Pet. Br. 42 (quoting 2 Farrand 553). This revisionist approach is doubly flawed. First, the Committee of Style's revisions were extensive and included some substantive changes, such as adding the prohibition, contained in U.S. Const. Art. I, § 10, Cl. 1, against State impairment of contracts.[22] Second, even assuming that the Committee performed only a narrowly limited function, its use of the word "sole" is entitled to no less weight than any other word of the text, because the Committee revision perfected what "had been agreed to."[23] There is no reason to doubt that the members of the Committee of Style—William Samuel Johnson, Gouverneur Morris, Alexander Hamilton, James Madison, and Rufus King—accurately captured and clarified the

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[22] See 1 *1787 Drafting the U.S. Constitution* 1083-1084 (W. Benton ed. 1986); compare 1 *id.* at 1087-1088.

[23] Petitioner's contrary argument misapplies the reasoning of *Powell* v. *McCormack*, 395 U.S. 486, 538-539 (1969). The Court in that case rejected an argument that attached substantive significance to the Committee of Style's changes. In doing so, the Court did not question that the Constitution's final wording—and not the intermediate drafts—authoritatively expresses the Framers' intent.

Convention's intent. And indeed, the Convention itself put any such doubts to rest by approving the text they submitted. See 2 Farrand 663-667.[24]

Petitioner argues, more generally, that the Court should review his challenge because "interpreting constitutional limits is the business of the courts." Pet. Br. 43. That argument, however, takes petitioner nowhere. Petitioner concedes that he was duly impeached by the House for impeachable offenses. He does not dispute that the Senate had power to remove him from office. And he does not contend that the Senate violated the three express procedural provisions (see p. 18, *supra*) on trial of impeachments. Rather, petitioner argues that the Impeachment Trial Clause restricts the procedures that the Senate may use to receive evidence. But petitioner is simply making this up; as we have explained, the Impeachment Trial Clause contains no such limitation. Accordingly, there is no justiciable dispute for the courts to decide.[25]

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[24] Petitioner is similarly mistaken in arguing that the Senate did not exercise its "sole" power in this case. See Pet. Br. 42-43. The full Senate both adopted the Senate Impeachment Rules, see S. Doc. No. 1, *supra*, at 183, and approved the application of Senate Rule XI to petitioner's case. See p. 7, *supra*. The full Senate also denied petitioner's motion to hear testimony on the Senate floor. See p. 9, *supra*. Petitioner errs in attempting to draw inferences from the exclusion of impeachment convictions from the President's pardon power, U.S. Const. Art. II, § 2, Cl. 1. See Pet. Br. 43. As the court of appeals explained, "[w]hile the absence of any such express limitation on judicial interference might support an 'expressio unius' argument in favor of judicial review, a more plausible reading is that the framers simply assumed that courts had nothing whatever to do with impeachments." Pet. App. 8a.

[25] Petitioner cites *Powell* v. *McCormack*, *supra*, and other cases for the proposition that "even when the Constitution assigns a power to a coordinate political branch this Court must still judge whether that branch has complied with the textual limitations on its power." Pet. Br. 43-44. But if the Impeachment Trial Clause does not impose a limitation on the Senate's methods for receiving evidence, then there is no question of compliance to judge. See Pet. App.

b. Petitioner also contends that the principle of separation of powers requires judicial review of his challenge to the Senate's impeachment procedures. He contends that if the Senate has "the unreviewable power, not only to conduct impeachment trials, but to construe the constitutional provisions that govern that power," the danger arises that the Legislative Branch would assume judicial power. Pet. Br. 48. If we are correct, however, that the Impeachment Trial Clause expressly confers power on the Senate alone to determine impeachment trial procedure, then the Senate's exercise of that function is, by constitutional design, wholly within its purview. Cf. *INS* v. *Chadha*, 462 U.S. 919, 955 (1982) (dictum).

Petitioners' position, if accepted, would seriously erode the Framers' conception of our system of government. As Hamilton explained, pp. 21-22, *supra*, the Framers formulated the impeachment power as the sole check on a life-tenured judiciary. The practical effect of adopting petitioner's position would be to place ultimate control over the impeachment process in the *same* body that the impeachment process was intended to regulate. Petitioner provides no basis for this fundamental departure from the Framers' design.[26] The consequences of that

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10a-13a (distinguishing *Powell* under a "political question" analysis); *id.* at 18a (Randolph, J., concurring) (distinguishing *Powell* under a direct textual analysis). Petitioner also cites *United States Dep't of Commerce* v. *Montana*, *supra*, for the proposition that the "political question" doctrine would apply only if all congressional decisions relating to impeachment are beyond judicial review. See Pet. Br. 45. Obviously, there is no occasion to reach that issue if the text of the Constitution renders the specific matter at issue here—the Senate's procedures for receiving evidence—nonjusticiable. Nor does it logically follow from an assumption that there could be judicial review of a claim that one of the express limitations had been transgressed—*e.g.*, that the Senate sought to remove an officer who had not been impeached by the House—that there would be judicial review of any claim relating to impeachment.

[26] Even if it were permissible for this Court to second-guess the Framers' grant to the Senate of the sole power to try impeachments, no basis exists for challenging the Framers' placement of trust in

departure are ominous. As the court of appeals explained, "the judiciary would have final unreviewable power over the one procedure established to restrain excesses in all its other final and unreviewable powers." Pet. App. 15a. The Framers, who were intent on leaving no branch of government unchecked, could not have intended such a result.[27]

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that body. Petitioner's protestations to the contrary, there is no reason to doubt that the Senate is institutionally capable of formulating appropriate rules for making factual determinations in its impeachment trials. Nor is there any reason to presume that the Senate, whose numerous Members take the same oath as Members of this Court—and additionally are subject to electoral accountability—will act in a lawless or malicious manner. Cf. *Webster* v. *Doe*, 486 U.S. 592, 613 (1988) (Scalia, J. dissenting).

[27] Significantly, if the Senate's impeachment procedures are subject to judicial review, it is unclear where that inquiry should begin or where it will end. Judge Edwards' suggestion that the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, provides petitioner with a cause of action to review the Senate's procedures (Pet. App. 25a) appears, at best, dubious. See 5 U.S.C. 551(1)(A) ("agency" under the APA "does not include * * * the Congress"). But assuming such a cause of action, what relief should a court give? Could a court order petitioner's reinstatement as a federal judge? If his seat has been filled—as indeed, petitioner's has—could the court order Congress to create a new judicial opening? The consequences of judicial review could be especially unsettling in the case of impeachment of the President or a Chief Justice. "Even if the courts qualified a finding of justiciability with a rule against stays or specific relief of any kind, their review would undermine the new President's or Chief Justice's legitimacy for at least as long as the process took. And a declaratory action *without* final relief awarding the office to one person or the other could confound matters indefinitely." Pet. App. 14a. Petitioner has provided no answer to those important practical concerns.

II. THE IMPEACHMENT TRIAL CLAUSE DOES NOT PROHIBIT THE SENATE FROM RECEIVING EVIDENCE THROUGH THE PROCEDURES SET OUT IN SENATE IMPEACHMENT RULE XI

The Impeachment Trial Clause grants to the Senate the "sole Power to try all Impeachments," including the subsidiary power to determine appropriate procedures for receiving evidence. But even if, as petitioner argues, the Impeachment Trial Clause gives the courts license to review the Senate's procedures, Senate Impeachment Rule XI would be valid. Contrary to petitioner's contentions, the Impeachment Trial Clause does not prohibit the Senate from appointing a committee of its Members to receive evidence for use by the whole body.

A. The Impeachment Trial Clause, By Its Terms, Does Not Prohibit The Senate From Appointing A Committee To Receive Evidence For The Senate's Use

The caption to petitioner's argument suggests that the issue in this case is whether "trial by committee is unconstitutional." Pet. Br. 25. But that is not the issue here. The question presented (Pet. Br. i) is whether the Impeachment Trial Clause prohibits the Senate from exercising discretion to appoint a committee to "receive evidence and take testimony." See Senate Impeachment Rule XI, S. Doc. No. 1, *supra*, at 186-187. The Impeachment Trial Clause plainly does not prohibit that practice. Indeed, as petitioner's arguments demonstrate, such a prohibition can be created only by distorting the constitutional text.

Petitioner principally contends that the Impeachment Trial Clause prohibits the practice because the Senate is obligated to "try" all impeachments. A requirement that the Senate "try" impeachments, however, does not prohibit the Senate from assigning evidence-gathering tasks to a committee of its Members. The absence of such a prohibition is especially apparent when the word "try" is examined from the viewpoint of the Framers. In the

Framers' era, the verb "to try" did not necessarily denote a formal courtroom adjudication; it more broadly meant "to examine," "to examine as a judge," or "to bring before a judicial tribunal." See 2 S. Johnson, *A Dictionary of the English Language* (1755).[28]

Under the Framers' usage, the Senate may "try" an impeachment by conducting all proceedings, including the receipt of evidence, on the Senate floor. But the Framers' use of the word "try" does not *require* that procedure. A specification that the Senate "examine" impeachments "as a judge" and act as a "judicial tribunal" does not prevent the Senate from appointing a committee to assemble and present the evidence relevant to the Senate's collective judgment. Indeed, the House and the Senate have long used committees to gather evidence when acting as "the Judge of the Elections, Returns and Qualifications of its own Members" (U.S. Const. Art. I, § 5)—a role in which the House or Senate is clearly acting as "a judicial tribunal." *Barry* v. *United States ex rel. Cunningham*, 279 U.S. 597, 616 (1929).[29]

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[28] Petitioner does not dispute that definition. See Pet. Br. 28 n.28. See also *Hastings*, 716 F. Supp. at 40-41 ("at the time the Constitution was drafted, definitions of 'try' included 'to sit in judgment' and 'to examine (a person) for the purpose of testing his qualifications' ") (quoting *Oxford English Dictionary*); see, *e.g.*, 2 Farrand 67 (Rufus King) (the President, like members of Congress, "would periodically be *tried* for his behavior by his electors") (emphasis added).

[29] As this Court has explained in *Barry*, the Constitution confers on Congress certain powers that are "judicial in character," including "the power to judge of the elections, returns and qualifications of its own members." 279 U.S. at 613. "In exercising this power, the Senate may, of course, devolve upon a committee of its members the authority to investigate and report; and this is the general, if not the uniform, practice." *Ibid.* See also *Reed* v. *County Comm'rs*, 277 U.S. 376, 388 (1928); *Morgan*, 801 F.2d at 446; 7 Annals of Cong. 33-44 (1797) (expulsion of Senator William Blount). Similarly, the Senate has long used committees to receive evidence when performing the judicial task of trying legislative contempts. See *Groppi* v. *Leslie*, 404 U.S. 496, 501 (1972).

Similarly, when a court conducts a formal adjudication, it may, as one part of the trial procedure, appoint a subordinate, such as a special master, to receive evidence and take testimony. See *Ex parte Peterson*, 253 U.S. 300, 312-313 (1920). A federal court's "inherent power" to appoint a special master, which courts have exercised "[f]rom the commencement of our Government," *id.* at 312, is now embodied in Fed. R. Civ. P. 53. Significantly, Rule 53 allows the master broad powers in receiving evidence and taking testimony for use by the court:

> The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses under oath and may examine them and may call the parties to the action and examine them upon oath.

Fed. R. Civ. P. 53(c).[30] Indeed, for more than 100 years, this Court has employed special masters to receive evidence and take testimony in original cases. See, *e.g.*, *Wyoming* v. *Oklahoma*, 112 S. Ct. 789 (1992); *Ohio* v. *Kentucky*, 410 U.S. 841, 644 (1973); *Arizona* v. *California*, 373 U.S. 546, 551 (1963); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 50 U.S. (9 How.) 647, 657-659 (1850). The Court plainly does not disregard its duty to adjudicate original actions by employing special masters to perform evidence-gathering functions.[31]

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[30] Rule 53(e) further states that in "an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous," Fed. R. Civ. P. 53(e)(2), while in "an action to be tried by a jury" the "master's findings * * * are admissible as evidence," Fed. R. Civ. P. 53(e)(3).

[31] See also 28 U.S.C. 636(b)(1) (allowing magistrate judges to conduct hearings); Pet. App. 55a-56a (noting that administrative agencies employ hearing examiners) (Edwards, J., concurring);

Petitioner accordingly is mistaken in asserting that the Framers' use of the word "try" prohibits the Senate from appointing a committee to receive evidence. That word simply lacks the limiting character that petitioner ascribes to it. Petitioner's citations to other Impeachment Trial Clause terms, such as "sitting," "present," "convict," "preside," and "oath" are similarly unavailing. See Pet. Br. 25-26. Those terms, even when viewed collectively, do not prohibit the Senate from conducting an impeachment trial in which—as one aspect of the proceeding—the Senate appoints a committee for the limited purpose of gathering evidence for the whole body. Petitioner's additional citations to the Framers' use of "trial" and "convicted" in Article III (Pet. Br. 27-28) are also unavailing. It is clear from the language and context that Article III prescriptions do not apply to Senate impeachment trials.[32]

B. The Drafting History And Contemporaneous Commentary Confirm That The Senate May Appoint A Committee To Receive Evidence For The Senate's Use

The absence of any textual prohibition on the Senate's use of a committee to receive evidence should be dispositive of petitioner's claim. The drafting history and contemporaneous commentary provide additional confirma-

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Hastings, 716 F. Supp. at 41 ("persons and bodies may sit in judgment without having received evidence in the manner Article III courts try criminal charges").

[32] The Framers' provision in Article III that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury" (U.S. Const. Art. III, § 2, Cl. 3) reveals, perhaps, the Framers' expectation that impeachment trials would bear some similarity to judicial trials. But that does not mandate a constitutional requirement that Senate impeachment trials conform exactly to court procedure. Indeed, by placing the impeachment trial power in the Senate and by excepting impeachment trials from the jury requirement, the Framers demonstrated a clear understanding that impeachment trial procedure would *differ* from normal court procedure. See Pet. App. 44a (Edwards, J., concurring).

tion that no such prohibition exists. As petitioner must concede, the Framers did not evince any intention to restrict how the Senate should receive evidence. At the same time, Hamilton's *Federalist* essays reveal the Framers' understanding that although Senate impeachment trials would have "judicial" characteristics, the Senate could adopt flexible procedures. Such practices plainly could include the English practice of appointing a committee to take evidence.

Hamilton explained in *The Federalist* No. 65 (J. Cooke ed. 1961), that the Senate would conduct impeachment trials in a "judicial character as a court." *Id.* at 439. But he also noted that the "institution" is "designed as a method of NATIONAL INQUEST into the conduct of public men." *Id.* at 440. In justifying the use of the Senate for that purpose, he stated:

> The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the offence by the prosecutors, or in the construction of it by the Judges, as in common cases serve to limit the discretion of courts in favor of personal security.

Id. at 442. Hamilton's recognition of the need for procedural flexibility was echoed in the Senate in the first impeachment trial, the impeachment of Senator William Blount in 1798.[33] And Hamilton's point was reiterated by Justice Story in his *Commentaries on the*

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[33] A report of the Senate debate notes the statement of Senator James Ross that the proceeding "was not like a criminal prosecution in the forms of process * * *. It was neither a criminal nor civil prosecution but a trial by impeachment. The mode of proceeding was not according to the forms of the common law, but according to forms attached to that particular mode of trial." Aurora, Feb. 28, 1798, at 2, col. 2 (available in Library of Congress, Serial and Government Publications Division). See also Pet. App. 46a-47a & n.16.

Constitution of the United States, the first major treatise on the document. See 1 J. Story, *supra*, at 559-560.[34]

As Hamilton described, the Framers drew the Constitution's impeachment provisions largely from historical experience, and English practice was the model "from which the idea of this institution has been borrowed." *The Federalist* No. 65, at 440 (J. Cooke ed. 1961). Significantly, the House of Lords used the very procedural device at issue here in its impeachment proceedings. The historical record "shows beyond doubt that the House of Lords used committees to hear evidence during impeachment trials in the early 17th century." Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U. L. Rev. 512, 531 (1975). See Pet. App. 48a-50a, 53a-54a (Edwards, J., concurring).[35]

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[34] Justice Story observed that when acting as a court of impeachment, the Senate is "confined as little as possible to strict forms." 1 J. Story, *supra*, at 560. He explained:

> [T]he strictness of the forms of proceeding in cases of offences at common law is ill adapted to impeachments. The very habits growing out of judicial employments, the rigid manner in which the discretion of judges is limited and fenced in on all sides, in order to protect persons accused of crimes by rules and precedents, and the adherence to technical principles, which, perhaps, distinguishes this branch of the law more than any other, are all ill adapted to the trial of political offences in the broad course of impeachments.

1 J. Story, *supra*, at 559-660.

[35] This history may be traced at least as far back as the impeachment trial of Sir Francis Bacon in 1620, where the House of Lords "appointed a select Committee of themselves, to take Examination of Witnesses." 2 T. Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783*, at 1101 (1816); see also *id.* at 1116 (House of Lords appointed committee to examine witnesses in trial of Dr. Field, Bishop of Landaff, in 1620); *id.* at

The House of Lords' use of committees to receive evidence is highly pertinent because it sheds light on the Framers' understanding of how Senate impeachment trials might be conducted. Petitioner discounts the importance of the English historical practice (Pet. Br. 31 n.29), but he cannot deny that it existed. His suggestion that the Framers were ignorant of the English practice seems especially doubtful. Although the English precedents provide "no direct reference to the use of committees" during the Framers' era, the procedure that the House of Lords adopted in the 17th Century "has never been banned or disavowed." Williams, *supra*, 50 N.Y.U. L. Rev. at 532.[36]

1122-1124 (House of Lords examined witnesses in three committees in trial of Sir Giles Mompesson in 1620).

The most complete description of the House of Lords' use of evidentiary committees in impeachment trials is drawn from the trial of Lionel Cranfield, Earl of Middlesex and Lord Treasurer, in 1624. Following the presentation of charges by the House of Commons, the House of Lords "divided themselves into committees to examine witnesses." E. Foster, *The House of Lords, 1603-1649*, at 157 (1983). The Lords examined a "great number" of witnesses in committee and furnished Cranfield with copies of the written depositions " 'of all Witnesses, as well against him as for him.' " *Id.* at 158, 283 n.52 (quoting House of Lords Journals).

Following the receipt of all evidence, Cranfield was brought to the bar of the House of Lords. The charges were presented, and "[t]he clerk read the depositions of witnesses as proof. The lord treasurer [Cranfield] spoke in reply." E. Foster, *supra*, at 158. Following Cranfield's "recapitulat[ion of] his defense," the Lords deliberated and voted. *Id.* at 159. Because the Lords "seem to have been well content with what they had done" at the Cranfield trial, "[t]hey summed up their experience in Standing Orders concerning judicature, which would guide them in the future." *Id.* at 160. These Standing Orders provided for the receipt of testimony in committee by requiring that "[d]efendants should have copies of all depositions, as had been resolved in Cranfield's case." *Ibid.*

[36] The absence of evidence of committee use during the Framers' era is attributable, in part, to the decline in the English use of impeachment. See Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 Yale L.J. 1419, 1433 (1975) (5 completed trials between 1626 and 1715); P. Hoffer & N. Hull,

Petitioner does not dispute that the Framers' contemporary, Thomas Jefferson, clearly *was* aware of that practice. Jefferson documented that procedure in the parliamentary manual that he prepared for the Senate's use while serving as the President of that body from 1797 to 1801. See *Jefferson's Parliamentary Writings: "Parliamentary Pocket-Book" and A Manual of Parliamentary Practice* (W. Howell ed. 1988) [hereinafter *Jefferson Manual*].

Jefferson derived his rules of Senate procedure from "the precepts of the Constitution, the regulations of the Senate, and where these are silent, of the rules of Parliament." *Jefferson Manual* 355. He described the House of Lords' practice of appointing committees to obtain evidence as follows:

> The practice is to swear the witnesses in open House, and then examine them there: or a committee may be named, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand.

Jefferson Manual 424.[37] Jefferson's description is both accurate and authoritative. Indeed, Jefferson's manual "is regarded by English parliamentarians as the best state-

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Impeachment in America, 1635-1805, at 267 (1984) ("impeachment had just about disappeared from the English constitutional horizon between 1718 and 1786"). Thus, it is likely that the Framers would have looked to 17th Century English practice in studying the English "model." See E. Foster, *supra*, at 162 ("The procedure that [the Lords] had established in 1621 and 1624 did not greatly change. They had worked it out in considerable detail and had taken care to record what had been done. The procedure would serve as a precedent and model for the future.").

[37] Jefferson derived his description of impeachment trial procedure from a Parliamentary Pocket-Book that he compiled beginning in the late 1760s and that was a "source-book" for his subsequent manual. See *Jefferson Manual* 8, 43, 155. Jefferson had completed the section on impeachment by the time of the Blount impeachment in 1798 and provided a copy to the Senate committee charged to study procedures for the Blount trial. See *id.* at 12-13.

ment of what the law of Parliament was at the time Jefferson wrote it."[38]

Given Jefferson's knowledge of the House of Lords' procedure, it is likely that his contemporaries, who had studied English impeachment and used it as their "model" in drafting the Constitution, were aware of that procedure as well. See Williams, *supra*, 50 N.Y.U. L. Rev. at 539. Even apart from Jefferson's documentation of the House of Lords' practice, its existence "and the absence of any affirmative rejection of it by the American framers, effectively refutes the suggestion that the use of committees in impeachment trials would have been alien or repulsive to those who designed the Constitution." Pet. App. 53a (Edwards, J., concurring).[39]

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[38] *Constitution, Jefferson's Manual and Rules of the House of Representatives*, H.R. Doc. No. 248, 100th Cong., 2d Sess. § 284, at 115 n.*a* (1988). See also *Goldwater* v. *Carter*, 617 F.2d 697, 718 (D.C. Cir.) (in banc) (reliance on the manual "as a guide for Congressional procedure persists to this day") (MacKinnon, J., dissenting in part), vacated on other grounds, 444 U.S. 996 (1979).

[39] Petitioner's dismissal of Jefferson's views on the ground that he was not a Convention delegate (Pet. Br. 32-33) and that he had a mistaken vision of the American impeachment process (*id.* at 33 n.32) is misdirected. Jefferson's manual is obviously pertinent because it confirms American familiarity with the English historical practice of using committees to collect impeachment evidence. Petitioner's suggestion that Jefferson was biased (*ibid.*) is also misplaced. Indeed, this Court's specific citation to Jefferson's parliamentary manual and its frequent citations to his other writings manifest the value of Jefferson's views. See, *e.g.*, *Hutchinson* v. *Proxmire*, 443 U.S. 111, 125 (1979) (Speech or Debate Clause); *United States* v. *Brown*, 381 U.S. 437, 446 n.20 (1965) (Bill of Attainder Clause). *Tenney* v. *Brandhove*, 341 U.S. 367, 375 n.4 (1951) (Speech or Debate Clause); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 642 n.10 (1952) (Jackson, J., concurring) (War Powers Clause).

C. Neither Separation of Powers Principles, Nor Prior Senate Practice, Nor General Principles of "Fairness" Prohibit the Senate From Appointing a Committee to Receive Evidence

Petitioner challenges Senate Impeachment Rule XI on three additional nontextual grounds. He argues that: (1) separation of powers requires receipt of evidence before the full Senate (Pet. Br. 28-31); (2) the Senate in the past received evidence in that manner (*id.* at 31-33); and (3) petitioner's interest in "fairness" overrides the Senate's interest in efficient management of its duties (*id.* at 33-34). None of those arguments has merit.

1. Petitioner contends that the Senate acts as the "numerous court" envisioned by the Framers, *The Federalist* No. 65, at 441, only if evidence is received orally in the Chamber where the full Senate meets. Pet. Br. 28-30. That contention is untenable. As we have noted, the full Senate adopted Senate Rule XI, and the full Senate determined to utilize the rule in petitioner's case. To be sure, the Senate gave the committee a limited role of gathering evidence, identifying "facts that are uncontested," and summarizing "evidence that the parties have introduced on contested issues of fact." App., *infra*, 8a. But the committee exercised even less authority than a special master in a court adjudication—it neither proposed findings of fact nor made a recommendation on the merits. Nor do impeachment committees rule on dispositive legal motions, which are decided by the full Senate. See p. 4 n.3, *supra*. "Whatever the committee's role in *gathering evidence*, the final deliberations and decisionmaking concerning [petitioner's] guilt *were* conducted by the full Senate, fulfilling the framers' intention that conviction or acquittal be decided by a more numerous body." Pet. App. 55a n.19 (Edwards, J., concurring).[40]

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[40] Petitioner's suggestion that the committee summarized the record in a manner that prejudiced him (Pet. Br. 35) is incon-

2. Petitioner next describes the Senate's impeachment trials from the 19th and early 20th Centuries, in which the Senate did receive evidence on the Senate floor, and argues that this practice "confirms that impeachment trials must be conducted before the entire Senate." Pet. Br. 8-12, 31. As Judge Edwards correctly concluded:

> There is simply no basis in the historical record to believe that the Senate's failure to employ a committee during its early impeachment trials reflected any considered judgment that such an alternative was beyond its constitutional authority. Rather, all we know is that, for many years, the Senate apparently found it unnecessary even to consider using evidentiary committees in impeachment proceedings, and none was used; but when circumstances were perceived to be different in 1935, the Senate adopted Rule XI allowing for the use of such committees.

Pet. App. 50a-51a. See *Williams*, *supra*, 50 N.Y.U. L. Rev. at 540-542.[41]

The Senate's historical practice reveals that the body revised its impeachment trial procedures in response to its increased responsibilities. It adopted evidence-gathering techniques that promote the efficiency, while preserving the fairness, of the impeachment trial process. In the early days of the Union, the Senate could receive impeachment evidence on the Senate floor, just as this Court could convene to conduct jury trials. See *Georgia* v. *Brailsford*, 3 U.S. (3 Dall.) 1 (1794). But in the

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sistent with his argument that the committee "proved far more receptive to the arguments of the accused than were their uninformed colleagues" (*id.* at 33). In any event, petitioner had the opportunity to raise such claims before the full Senate, which retained the right to hear additional testimony after submission of the committee report. See S. Doc. No. 1, *supra*, at 186-187.

[41] See also *Ballin*, 144 U.S. at 5 ("It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to prescribe rules is not one which once exercised is exhausted.").

modern era, both the Senate and this Court face vastly greater demands. See *Groppi* v. *Leslie*, 404 U.S. 496, 500 (1972) (noting that "full-blown" legislative trials for contempt could potentially immobilize "vital legislative processes").

The impetus for revising impeachment trial procedures developed at the turn of the century, when Senator Hoar suggested directing the Rules Committee to report whether the Senate "may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of the English House of Lords in such cases, questions of the admission of material testimony and the final argument being reserved for the full Senate." 38 Cong. Rec. 3660 (1904).[42] The Senate acted in 1935, after the 10-day impeachment trial of Judge Harold Louderback. It adopted the optional procedure now embodied in Senate Rule XI, which gives the Senators full access to the relevant evidence, while preserving their ability to conduct other business. 79 Cong. Rec. 8309-8310 (1935). See *Williams*, *supra*, 50 N.Y.U. L. Rev. at 539-542.

The Senate's objective was not to shirk its constitutional obligations, but rather to improve its evidence-gathering process. The committee procedure, which "constitutes a part of the trial by the Senate," 78 Cong. Rec. 9928 (1934) (Sen. Robinson), was designed to make the evidence *more* accessible to the Senate:

> There are times when there is not a quorum of the Senate present, when a dozen may not be here, when there are less than the number provided as the membership of the proposed committee to take the evidence. There is no use expecting all the Senate, or a quorum of the Senate, to be present every minute while evidence is being taken. Senators have read the evidence in the RECORD in order to know what it is.

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[42] Senator (later Justice) Sutherland made a similar proposal in 1912, in the midst of the Senate's 22-day trial of Judge Robert Archbald, noting that "time has been taken away from the important business of the Senate." 49 Cong. Rec. 698 (1912).

Id. at 9929 (Sen. Norris).[43] Senator Norris explained that, following the taking of evidence by a committee, "[t]he trial of the case would take place in the Senate, the evidence would be offered here, and the Senate would pass on it." *Ibid.*[44]

The procedure that the Senate adopted ensures that a complete evidentiary record is assembled for Senate review. Receipt of evidence in committee is far preferable to receipt on the Senate floor, where actual attendance may be less than the attendance in committee and the composition of the group is "constantly changing." Pet. App. 51a-52a (quoting Williams, *supra*, 50 N.Y.U. L. Rev. at 540-542). To observe witnesses testify, those Senators who are not on the committee may attend the committee hearing, watch the live television broadcast, or review the broadcast on videotape. Further, if the full Senate believes that expanded attendance is warranted, all or a relevant part of the evidence may be received on the Senate floor. See S. Doc. No. 1, *supra*, at 186-187.[45]

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[43] Senator Sutherland had similarly explained, with respect to the 1922 trial of Judge Archbald, "[m]any of the Senators could not be present to hear the testimony, and of necessity they are obliged to read it before they can act. The same result, it seems to me, would be obtained by referring the case in the first instance to the Judiciary Committee to take the testimony and report it to the Senate." 49 Cong. Rec. 698 (1912).

[44] Petitioner's implication that floor attendance was satisfactory before Rule XI was adopted (Pet. Br. 10-11, 39) and that Senators who missed evidence invariably excused themselves from voting on the articles (*id.* at 11, 32) is not borne out by the historical record. See Pet. App. 50a-52a.

[45] Petitioner mistakenly suggests (Pet. Br. 13-14) that the Senate originally required the consent of the defendant to receive evidence by committee. The Senate's procedures have never required such consent. See S. Doc. No. 1, *supra*, at 186-187; 79 Cong. Rec. 8309-8310 (1935). The Senate may take into account a defendant's wishes, as perhaps it did in declining to invoke the committee procedure in Judge Ritter's 1936 impeachment trial. See 80 Cong. Rec. 3425 (Sen. Austin) (1936); *id.* at 3425-3426 (Sen. Ashurst). But

The need for Senate Impeachment Rule XI is all the more manifest today. The judiciary has nearly tripled over the past thirty years, and has grown nearly forty-fold since 1789.[46] At the same time, there has been a parallel increase in legislative demands.[47] In light of those circumstances, the Senate is entirely justified in adopting procedures that preserve the fairness and promote the efficiency of its processes.[48]

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the Senate is not required to conform its procedure to the defendant's desires. 78 Cong. Rec. 9928 (1934) ("I should think the Senate would be the judge of whether it wished to hear the witnesses in person, or to take their testimony by deposition, or in some other way.") (Sen. Robinson).

[46] Compare 28 U.S.C. 1, 44, and 133, as amended by Federal Judgeship Act of 1990, Pub. L. No. 101-650, §§ 202-203, 104 Stat. 5098-5103 (837 federal judgeships) with R. Posner, *The Federal Courts: Crisis and Reform* 357 (1985) (312 active federal judges in 1960); with The Judiciary Act of 1789, ch. 20, §§ 1-3, 1 Stat. 73, 73 (19 federal judgeships). Two other federal judges have recently been convicted of criminal offenses. See *United States* v. *Aguilar*, Cr. No. 89-365 (N.D. Cal. Nov. 1, 1990), appeal docketed, No. 90-10597 (9th Cir. Nov. 20, 1990); *United States* v. *Collins*, Cr. No. 91-035 (E.D. La. Sept. 6, 1991); appeal docketed, No. 91-3778 (5th Cir. Sept. 13, 1991).

[47] While the congressional sessions in which the first three impeachment trials were held lasted an average of 123 days, the sessions during which Claiborne, Hastings, and petitioner were tried consumed an average of 301 days. Compare *1989-1990 Congressional Directory*, S. Prt. No. 29, 101st Cong., 1st Sess. 520-521 (1989) with *id.* at 527 and 135 Cong. Rec. 1 (1989) and *id.* at D1430 (daily ed. Nov. 21, 1989). In the same period, the pages of laws that Congress enacted grew from 55 to 3,414. Compare 2 Stat. 245-346 (1803-1805) and 4 Stat. 431-494 (1830-1831) with 100 Stat. 3-4309 (1986) and 103 Stat. 3-2524 (1989).

[48] Petitioner's calculation (Pet. Br. 38) of the average interval between impeachment trials as 13 years is obviously not reflective of actual burdens on the Senate because impeachments do not space themselves neatly every 13 years. After 50 years without an impeachment, the Senate was required to conduct three trials in four years, two—including that of petitioner—in the same session of Congress. See Pet. App. 51a n.18.

3. Finally, petitioner argues that Senate Impeachment Rule XI is "inherently unfair." Pet. Br. 33. But as this Court has stated with respect to other House or Senate rules, "it is no impeachment of the rule to say that some other way would be better, more accurate or even more just." *Ballin*, 144 U.S. at 5.[49] The Senate, which has sole authority to make the substantive judgment whether petitioner has committed an impeachable offense, is the appropriate body to determine what procedures properly accommodate the interests of fairness and efficient fact-finding.[50]

If this Court nonetheless elects to undertake a more searching inquiry into the "fairness" of Rule XI, it should conclude that the procedures embodied therein amply protect petitioner's interests. Petitioner rests his

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[49] Petitioner has not contended that the Senate Impeachment Rule XI is so "unfair" as to violate due process. Nor could he. In determining what process is "due," this Court has looked "to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856). Thus, the English practice of using committees to collect evidence would be fatal to a due process challenge. See, *e.g.*, *Griffin* v. *United States*, 112 S. Ct. 466, 470 (1991).

[50] There is nothing novel in the notion that the body empowered to make substantive judgments is also entitled to determine what procedures are fair. For example, this Court has long determined appropriate procedures in original actions. See *Ohio* v. *Kentucky*, 410 U.S. at 644; *Rhode Island* v. *Massachusetts*, 39 U.S. (14 Pet.) 210, 256-257 (1840); Sup. Ct. R. 17. Similarly, this Court has long recognized that agencies have discretion to develop appropriate rules of procedure where Congress is silent on the matter. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) ("Even apart from the Administrative Procedure Act this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments.").

argument of "unfairness" on generalized assertions that the "[c]redibility issues" were central to this case and that those issues could not be decided "responsibly" when only the committee actually saw and heard the witnesses. Pet. Br. 34. He attempts to demonstrate that supposed unfairness by showing a divergence between how the Senate as a whole voted and how those Senators who were members of the impeachment committee voted. Pet. Br. Apps. B, C. Neither his argument nor his statistical demonstration is persuasive.

Senate Impeachment Rule XI fully addresses petitioner's "credibility" concerns by preserving the right of the Senate to "send[] for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate." S. Doc. No. 1, *supra*, at 186-187. Petitioner had a full opportunity to raise before the full Senate the same objections concerning witness credibility that he presents here. Thus, petitioner's challenge amounts to nothing more than a quarrel about how the Senate exercised its discretion in *this* case. If the Senate is to have *any* power to conduct impeachment trials, such exercises of discretion surely should be beyond review.[51]

In any event, petitioner is incorrect in his premise that credibility issues can be resolved only by having the full Senate "see and hear" all of the testimony. Pet. Br. 34-35. Witness demeanor is scarcely the only factor relevant to credibility. Consistency in the substance of a witness's statements, for example, is also relevant. In this case, the direct inconsistency between petitioner's statements before the grand jury and his own admissions was persuasive evidence that he committed perjury. See

[51] Although petitioner had the right to request the Senate to call particular witnesses to testify in "open Senate," he pointed to no particular issues as to which the evidentiary record required elaboration and identified no specific witnesses whose testimony should be heard on the Senate floor. See 135 Cong. Rec. S14,502-S14,513 (daily ed. Nov. 1, 1989) (oral argument).

pp. 5-6, *supra*.[52] The testimony of the other witnesses, whose credibility he attacks, simply bolstered that conclusion.[53]

Petitioner's attempt to demonstrate "unfairness" by comparing the votes of Senators who serve on impeachment committees with those who do not (Pet. Br. 4-15, 33) ultimately proves nothing. Even assuming that the supposed disparity is meaningful as a matter of statistical science, there is no basis for concluding that the disparity arises from "hearing and seeing" witnesses, rather than from some other source. Members of impeachment committees are not selected to mirror the composition of the Senate as a whole. The characteristics of the committee members may differ with respect to a wide variety of salient attributes, including party affilia-

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[52] See also *Nixon*, 881 F.2d at 1313 (noting that petitioner's "perjury convictions did not depend simply upon a three-way credibility battle among Bud Holmes, [petitioner] and Fairchild" and that "the fact of the telephone discussion between Wiley and [petitioner] was acknowledged even by [petitioner]").

[53] Significantly, the full Senate had the opportunity to assess *petitioner's* credibility through his personal presentation on the Senate floor. Because the Senate deliberates in secret, most Senators' view of the case cannot be known definitively. A number of Senators who chose to explain their votes publicly, see S. Doc. No. 22, 101st Cong., 1st Sess. 443-465 (1989), nevertheless commented on petitioner's lack of credibility. For example, Minority Leader Robert Dole explained that his

> decision to convict Judge Nixon under article I, therefore, turned on an evaluation of Judge *Nixon's own credibility, and not on the credibility of * * * any other witness. I listened carefully to the remarks of Judge Nixon before the Senate.* At times, these remarks were very poignant. But unfortunately, *Judge Nixon and his words failed to have the ring of truth.*

Id. at 457 (emphasis added); accord *id.* at 453-456 (Sen. James Jeffords); *id.* at 459-465 (Sen. Frank Murkowski). Petitioner's citation to Senator Heflin's statement (Pet. Br. 34) that only the impeachment committee has "the advantage of hearing the testimony" (*ibid.*) does not aid petitioner. Senator Heflin served on the impeachment committee in petitioner's case and voted with the majority to convict petitioner on articles I and II. See J.A. 23a-24a, 26a.

tion, seniority, professional training, and region. The variation in voting patterns that petitioner cites cannot confidently be attributed to *any* particular factor.[54]

There was, in short, no unfairness in petitioner's impeachment conviction and removal from judicial office. Petitioner is doubtless disappointed in losing the position of high trust that the Constitution affords to federal judges. But the loss of his position of responsibility is not attributable to any defect in the Senate's impeachment trial procedures. Rather, it is a consequence of petitioner's own criminal conduct, which violated the public trust.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[54] In any event, more than two-thirds of those Senators who served on the petitioner's impeachment committee joined in voting to convict petitioner on Article I, and conviction on that Article alone was sufficient to remove him from office. See Pet. App. 23a n.3. Moreover, petitioner fails to explain how it would be more fair to have evidentiary proceedings before the "full" Senate, which would often mean that very few Senators would actually be in attendance, and which petitioner had conceded below would be constitutional irrespective of partial attendance. See Pet. App. 56a-57a, 84a-85a.

APPENDIX A

The Impeachment Trial Clause, U.S. Const. Art. I, § 3, Cl. 6, provides:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

The Rulemaking Clause, U.S. Const. Art. I, § 5, Cl. 2, provides:

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Senate Impeachment Rule XI, S. Doc. No. 1, 101st Cong., 1st Sess. 186-187 (1989), provides:

> That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.
>
> Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate

when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

APPENDIX B

ARTICLES OF IMPEACHMENT AS AMENDED

H. RES. 87, RECEIVED ON MAY 11, 1989.

[As amended by H. Res. 251, 101st Cong., 1st Sess.]

RESOLUTION Impeaching Walter L. Nixon, Jr., Judge of the United States District Court for the Southern District of Mississippi, of High Crimes and Misdemeanors

Resolved, That Walter L. Nixon, Jr., a judge of the United States District Court for the Southern District of Mississippi, be impeached for high crimes and misdemeanors, and that the following articles of impeachment be exhibited to the Senate:

Articles of impeachment exhibited by the House of Representatives of the United States of America in the name of itself and all of the people of the United States of America, against Walter L. Nixon, Jr., a judge of the United States District Court for the Southern District of Mississippi, in maintenance and support of its impeachment against him for high crimes and misdemeanors.

ARTICLE I

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District of Mississippi (Hattiesburg Division) to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the criminal prosecution of Fairchild's son, Drew Fairchild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon

did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Forrest County District Attorney Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

ARTICLE II

On July 18, 1984, Judge Nixon testified before a Federal grand jury empaneled in the United States District Court for the Southern District of Mississippi to investigate Judge Nixon's business relationship with Wiley Fairchild and the handling of the prosecution of Fairchild's son, Drew Fairchild, for drug smuggling. In the course of his grand jury testimony and having duly taken an oath that he would tell the truth, the whole truth, and nothing but the truth, Judge Nixon did knowingly and contrary to his oath make a material false or misleading statement to the grand jury.

The false or misleading statement was, in substance, that Judge Nixon had nothing whatsoever officially or unofficially to do with the Drew Fairchild case in Federal court or State court; and that Judge Nixon "never handled any part of it, never had a thing to do with it at all, and never talked to anyone, State or Federal, prosecutor or judge, that in any way influenced anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

ARTICLE III

By virtue of his office as a judge of the United States District Court for the Southern District of Mississippi, Judge Nixon is required to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to obey the laws of the United States.

Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts by the following:

After entering into an oil and gas investment with Wiley Fairchild, Judge Nixon conversed with Wiley Fairchild, Carroll Ingram, and Forrest County District Attorney Paul Holmes concerning the State criminal drug conspiracy prosecution of Drew Fairchild, the son of Wiley Fairchild, and thereafter concealed those conversations as follows:

(1) Judge Nixon concealed those conversations through one or more material false or misleading statements knowingly made to an attorney from the United States Department of Justice and a special agent of the Federal Bureau of Investigation during an interview of Judge Nixon conducted in Biloxi, Mississippi, on April 19, 1984. The substance of the false or misleading statements included the following:

(A) Judge Nixon never discussed with Wiley Fairchild anything about Wiley's son's case.

(B) Wiley Fairchild never brought up his son's case.

(C) At the time of the interview Judge Nixon had no knowledge of the Drew Fairchild case and did not even know Drew Fairchild existed, except for what the judge previously read in the newspaper and what he learned from the questioners in the interview.

(D) Nothing was done or nothing was ever mentioned about Wiley Fairchild's son.

(E) Judge Nixon had never heard about the Drew Fairchild case, except what he told the questioners in the interview, and certainly had nothing to do with the case.

(F) Judge Nixon had done nothing to influence the Drew Fairchild case.

(G) State prosecutor Paul Holmes never talked to Judge Nixon about the Drew Fairchild case.

(2) Judge Nixon further concealed his conversations with Wiley Fairchild, Paul Holmes, and Carroll Ingram concerning the Drew Fairchild case by knowingly giving one or more material false or misleading statements to a Federal grand jury during testimony under oath in Hattiesburg, Mississippi, on July 18, 1984. The substance of the false or misleading statements included the following:

(A) Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.

(B) To the best of his knowledge and recollection, Judge Nixon did not know of any reason he would have met with Wiley

Fairchild after the Nixon-Fairchild oil and gas investment was finalized in February 1981.

(C) Judge Nixon gave the grand jury all the information that he had and that he could, and had withheld nothing during his grand jury testimony.

(D) Judge Nixon had nothing whatsoever unofficially to do with the Drew Fairchild criminal case in State court.

(E) Judge Nixon never talked to anyone, including the State prosecutor, about the Drew Fairchild case.

(F) Judge Nixon never had a thing to do with the Drew Fairchild case at all.

(G) Judge Nixon "never talked to anyone, State or Federal, prosecutor or judge, that in any way influenced anybody" with respect to the Drew Fairchild case.

Wherefore, Judge Walter L. Nixon, Jr., is guilty of an impeachable offense and should be removed from office.

APPENDIX C

S. RES. 128, AGREED TO MAY 11, 1989.

[As amended by S. Res. 167, 101st Cong., 1st Sess.]

Resolved, That pursuant to rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, the Presiding Officer shall appoint a committee of twelve Senators to perform the duties and to exercise the powers provided for in the rule.

SEC. 2. The majority and minority leader shall each recommend six members to the Presiding Officer for appointment to the committee. The committee shall designate one of its members to be chairman and one of its members to be vice chairman.

SEC. 3. The committee shall be deemed to be a standing committee of the Senate for the purpose of reporting to the Senate resolutions for the criminal or civil enforcement of the committee's subpoenas or orders, and for the purpose of printing reports, hearings, and other documents for submission to the Senate under rule XI.

SEC. 4. During proceedings conducted under rule XI the chairman of the committee is authorized to waive the requirement under the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the presiding officer.

SEC. 5. In addition to a certified copy of the transcript of the proceedings and testimony had and given before it, the committee is authorized to report to the Senate a statement of facts that are uncontested and a summary, with appropriate references to the record, of evidence that the parties have introduced on contested issues of fact.

SEC. 6. (a) The actual and necessary expenses of the committee, including the employment of staff at an annual rate of pay, and the employment of consultants with prior approval of the Committee on Rules and Administration at a rate not to exceed the maximum daily rate for a standing committee of the Senate, shall be paid from the contingent fund of the Senate from the appropriation account "Miscellaneous Items" upon vouchers approved by the chairman of the committee, except that no voucher shall be required to pay the salary of any employee who is compensated at an annual rate of pay. (b) In carrying out its powers, duties, and functions under this resolution, the committee is authorized to, in its discretion and with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, to use on a reimbursable, or nonreimbursable, basis the services of personnel of any such department or agency.

SEC. 7. The Secretary shall notify the House of Representatives and counsel for Judge Walter L. Nixon, Jr., of this resolution.

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